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NO. 96-1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARY ANNA RIVET, MINNA REE WINER, EDMOND G. MIRANNE, and EDMOND G. MIRANNE, JR.,
Petitioners,

v.

REGIONS BANK OF LOUISIANA, WALTER L. BROWN, JR., PERRY S. BROWN, and FOUNTAINBLEAU STORAGE ASSOCIATES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners' opening brief demonstrated that the decision below runs counter to long-standing principles of federal jurisdiction, under which a lawsuit arises under federal law, and thus is removable to federal court from state court, only if a well-pleaded complaint shows that the plaintiffs' claims are based on rights that are granted by federal law. Under these principles, affirmative defenses are not considered in determining the contents of the well-pleaded complaint, so that the presence of a federal law defense is not sufficient to support federal jurisdiction. The decision below, we suggested, was really based on an outmoded distrust of the competence and the willingness of state courts to conscientiously apply federal law in determining whether otherwise valid state law claims are somehow precluded. And, as we showed, if the federal defense of res judicata is now held to be a proper basis for removal, there is no sound reason why other federal defenses should not also be a basis for removal. Thus, the decision below ventures out onto a slippery slope, with no real stopping places, that will entail a vast expansion of federal jurisdiction.

In the final analysis, respondents' argument to the contrary hangs by a single thread -- a tortured reading of a single footnote in one of this Court's cases. In our opening brief, we showed that this footnote, if it did rest on the notion that a federal defense can confer jurisdiction, would represent an aberration that has not been followed in more recent cases. In this reply brief, we first show how respondents' analysis is completely dependent on their construction of the footnote, and just how bare that thread is. We then respond to respondents' remaining attempts to answer our basic claims in this Court.

Respondents' Analysis

Respondents begin by recognizing the firmly established principle that a defendant's ability to advance a federal defense

to a state law claim is not a proper basis for federal jurisdiction. They further acknowledge that federal jurisdiction remains lacking if the plaintiff acknowledges the possible federal defense in his complaint but pleads the insufficiency of the defense. Respondents' Brief ("R. Br.") at 14. But respondents invoke the well-pleaded complaint rule and its "independent corollary," complete preemption. R. Br. 17. According to respondents, this doctrine was developed by four cases -- *Avco Corp. v. Machinists Lodge 735*, 390 U.S. 557 (1968); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987); and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). R. Br. 18-21.

Respondents then develop five propositions which, they say, support the assertion of federal jurisdiction in this case. First, according to respondents, if a state court complaint is brought under state law that the federal court determines to have been non-existent, the artful pleading doctrine permits the recharacterization of the complaint into one that is based on federal law, on the assumption that the necessary federal elements that would have supported federal jurisdiction were deliberately omitted to defeat removal. R. Br. 21-22. Respondents acknowledge, as they must, that the complete preemption cases are not controlling because there is no complete preemption here, *id.* 22. Instead, they say, the jurisdictional rule is the one created by the Court in *Federated Dep't Stores v. Moitie*, 452 U.S. 394 (1981) ("*Moitie*"). R. Br. 22-23.

Second, respondents argue that, properly understood, *Moitie* is really the analytic precursor of the complete preemption doctrine. After all, they point out, three of the four cases they identify as creating the complete preemption doctrine were actually decided after, and in light of, *Moitie*. R. Br. 26.

Third, they contend, *Moitie* stands for the proposition

that, when a state law claim is barred by a federal court judgment pursuant to the doctrine of res judicata, the claim is properly recharacterized as a complaint arising under federal law. R. Br. 27. Indeed, throughout their brief respondents repeatedly characterize *Moitie* as establishing a legal rule that may always be invoked to remove federally barred state court claims. *E.g.*, R. Br. 9 (summary of argument, second paragraph, stating absolute rule); 10 ("the 'artful pleading' rule established by *Moitie*"); *id.* ("the jurisdiction rule of *Moitie*"), *accord* 36, top line; 30 (caption invokes "The Jurisdictional Rule of *Moitie*"); *id.* ("[c]ases falling within the scope of *Moitie*'s jurisdictional rule").

Fourth, they argue that the holding establishing this bright line rule makes a great deal of sense because it advances two very important goals. R. Br. 32-36. Specifically, it ensures that the federal law of res judicata will be uniformly applied, and it enhances the significant federal interest in ensuring the full effectuation of the policies underlying res judicata.

Fifth, they argue that there is nothing wrong with deciding the merits of the preclusion defense as part of the determination of whether there is federal jurisdiction, because precisely the same sort of consideration is commonplace in the context of other jurisdictional determinations. R. Br. 36-38.

As we demonstrate in this reply brief, however, each and every one of these propositions is wrong.

1. Moitie's Jurisdictional Holding Did Not and Could Not Have Established Any Rule Allowing Removal Based on the Res Judicata Effect of Federal Judgments on State Law Claims.

In the first place, respondents err in arguing that this Court's decision in *Moitie* established any kind of rule allowing

removal based on the proposition that a federal judgment bars litigation of a state law claim. This fundamental error in interpretation of *Moitie* becomes apparent on a careful study of the celebrated footnote on which the court below rested its decision; the procedural context in which *Moitie* arose; and the ultimate disposition of the res judicata questions in *Moitie*.

Moitie arose in the aftermath of a federal antitrust action brought by the United States, and several "me-too" civil actions brought on behalf of private plaintiffs whose complaints tracked the allegations in the government's complaint. After the civil actions were dismissed for lack of standing, plaintiffs in most of the actions appealed. Counsel for the plaintiffs in two of the actions chose not to appeal, but rather refiled the cases in state court, purporting to raise only state law claims, but still tracking the allegations in the government's complaint. The defendants removed the state suit to federal court, and the district court analyzed the new state complaint and the dismissed federal court complaint and determined that plaintiffs had alleged "essentially federal claims." It therefore upheld the removal of the case and dismissed it as barred by the previous federal judgment. The plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit, and while this appeal was pending this Court held that private plaintiffs comparable to the *Moitie* plaintiffs did in fact have standing to sue for antitrust violations.

The court of appeals then reversed the dismissal of most of the private antitrust suits, on the ground that standing was in fact present. In *Moitie v. Federated Dep't Stores*, 611 F.2d 1267 (1980), it reached the same result with respect to the two plaintiffs who had refiled instead of appealing. It accepted the proposition that the district court had properly asserted jurisdiction, which was, according to the Ninth Circuit's opinion, the only issue that was briefed in that court; the parties apparently declined a pointed invitation from the court to address the issue of res judicata. 611 F.2d at 1268 n.2.

Proceeding to consider the unbriefed question, the court of appeals agreed that res judicata would ordinarily bar the suits. However, the court decided that it would be contrary to public policy and simple justice to apply the doctrine of res judicata to these plaintiffs in light of the fact that other plaintiffs (who **had** appealed) were being permitted to proceed and the dismissal of the non-appealing parties had been based on a case that had later been overruled.

This Court granted certiorari to decide whether this exception to res judicata was sound, but the individual plaintiffs, who were respondents in *Moitie*, apparently sought to avoid review on the theory that the case should not have been removed in the first place. This Court rejected that proposition in a one-paragraph footnote which is quoted in the respondent's brief at pages 24-25. The footnote first noted that the court of appeals in that case had affirmed the propriety of removal on the theory that the claims were federal in nature. The Court then stated, "We agree that **at least some of the claims** had a sufficient federal character to support removal." (emphasis added). Next the Court quoted a treatise to the effect that artful pleading may not be used to cut off a defendant's right to a federal forum, and that sometimes it is necessary to determine whether the real nature of the action is federal. The next three sentences, in our view, are the key to understanding the footnote and, along with the language emphasized above, contain the only jurisdictional holding that could be attributed to the footnote:

> The District Court applied that settled principle to the facts of this case. After "an extensive review and analysis of the origins and substance of" the two *Brown* complaints, it **found**, and the Court of Appeals expressly agreed, that respondents had attempted to avoid removal jurisdiction by "artful[ly]" casting their

> "essentially federal law claims" as state law claims. **We will not question here that factual finding.** [citations omitted].
>
> 452 U.S. at 398 n.2 (emphasis added).

From a review of the footnote, it quickly becomes apparent that the Court did not specify the claims that it had determined were federal, and thus removable; nor did it explain what made those claims federal despite the fact that the respondents had apparently been at pains to plead them all as state claims. Rather, the Court concluded at "at least some" of the claims in the case were federal, and that rather than reaching its own independent conclusion in that regard, it was resting its acceptance of federal jurisdiction on the district court's determination of artful pleading. The effect of this observation thus seems to be two-fold -- first, that it is the district court's decision about the jurisdictional basis that the Court was following, and, in that regard, that the district court's careful analysis of the nature of the removed complaint should not be disturbed at the second level of appellate review.

What makes ascertainment of the precedential impact of the Court's footnote particularly difficult is that the *Moitie* court of appeals, like this Court, did not describe the district court's analysis or the basis for its conclusion. Moreover, the district court's jurisdictional ruling was not officially reported. And because the Court was careful to note that it was not independently agreeing with each and every part of the district court's conclusions about jurisdiction, but only that, in light of the findings below, it was satisfied that "at least some" of the claims were sufficiently federal to support removal, the unreported district court opinion was not itself being elevated to the level of Supreme Court precedent.

There are, however, a number of clues in the opinion

clearly showing that *Moitie* does not stand for the proposition that respondents here and the panel majority below drew from it, namely that the res judicata effects of a federal judgment render any subsequent state court complaint that is barred by that judgment "exclusively federal" in character and hence removable.

The end of the opinion provides the most important evidence that the impact of res judicata on the state law claims in *Moitie* was not the basis for federal jurisdiction. After all, the Court did not decide that the state law claims were defeated by res judicata. **That** question was remanded for disposition in the court of appeals, on the ground that it was "unnecessary for the Court to reach that issue." 452 U.S. at 402. The only claims that the Court held had been extinguished were the federal antitrust claims that the Court concluded were also in the case. But if, in fact, the basis for jurisdiction were that res judicata principles barred prosecution of the state law claims, and thus they must be recharacterized as federal claims, then the decision of that res judicata impact would scarcely be unnecessary; it would have been necessary to the jurisdictional holding. It follows that, whatever claims the Court felt were sufficiently federal to warrant removal, it was **not** the state law claims that were allegedly barred by res judicata.[1]

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[1] This logical conclusion could be avoided if actual bar by res judicata were not required to warrant removal, but only the mere advancement of a res judicata defense. But even respondents do not contend that a defendant can remove an otherwise wholly state law case to federal court merely by pleading a res judicata defense. The wholesale increase in the federal docket and consequent invasion of the states' sovereign rights to adjudicate cases in their own courts that such a doctrine would foster is sufficient reason not to adopt it.

Moreover, although this Court did not explicate the district court's jurisdictional decision, or distinguish between removal based on res judicata or removal based on the belief that the plaintiffs there were relying on essentially federal law, there are fleeting references in the decision of the court of appeals that strongly imply that res judicata effects were **not** the basis for removal. According to the court of appeals, in removing the case, defendants "assert[ed] that the state law claims were really disguised federal antitrust claims. The district court agreed with defendants." 611 F.2d at 1268. And in affirming the removal decision, the court said, "The court below correctly held that the claims presented were federal in nature, arising solely from price fixing on defendants' part." No reference was made to artful pleading, and certainly not to res judicata. Absent some other explanation from this Court, it is fair to assume that its basis for accepting the propriety of federal jurisdiction was also not res judicata.

That this construction of the footnote is the most sensible one is also apparent in light of the fact that, even under respondents' analysis, what the district court below did to petitioners' complaint in this case was not really a recharacterization of the state law claims that rendered them federal. After all, what has allegedly been artfully pleaded is not an essential element of the state law claim, but an allegedly missing federal defense. *See* Rule 8(c), Federal Rules of Civil Procedure ("In pleading to a preceding pleading a party shall set forth affirmatively . . . res judicata . . ., and any other matter constituting an avoidance or affirmative defense.") Respondents contend that what petitioners did that constituted "artful pleading" was to fail to make explicit reference to the judgment of the bankruptcy court. But inclusion of such a reference would not have been sufficient to render the complaint one that arises under federal law. After all, under respondents' theory, the petitioners would still have had to allege their state law

claim, as well as setting forth the reasons why the bankruptcy judgment did not bar their claim. Thus, respondents' version of the artful pleading doctrine does not involve recharacterizing the state law claim at all -- it only requires state court plaintiffs overtly to allege the inapplicability of a federal law defense. And as respondents themselves concede at the outset of their analysis, it is not enough to create federal jurisdiction that the plaintiffs plead facts that would create a federal defense, and then allege facts (or legal considerations) which defeat that federal defense. This is true even if the validity of the federal defense were the only substantial or disputed question in the case. *Caterpillar*, 482 U.S. at 393.

Still another clue that *Moitie* does not establish a rule that the mere pleading of a federally barred state law claim is sufficient to support removal is this Court's repeated reference to the district court's determination in that case as a "factual finding" -- something that it "found" by the application of settled principles "to the facts of this case" -- and indeed based on an "extensive" review and analysis comparing the two complaints. But it surely does not take any such "findings" to base jurisdiction on the principles of res judicata. Presumably the "findings" in the district court were those determining that the federal claims previously dismissed in the initial case had been mischaracterized in the second case as state ones, as evidenced by the strong similarity between the factual allegations in the two complaints. This appears to be the most natural reading of the footnote.

By contrast, in the case now before the Court, the district court did not make an extensive analysis of the complaint, or compare it to claims made in the bankruptcy proceeding, before it determined that the case was federal in nature and therefore removable. It simply concluded that the claims were barred by res judicata and then stated that, under governing Fifth Circuit precedent, the res judicata effects of a

federal judgment are sufficient to render a state law claim removable as a matter of law. Unlike *Moitie*, therefore, there is no extensive review and no factual findings to which this Court can defer, and insofar as *Moitie*'s holding is actually that the Court should defer to such factual findings, that fact alone is sufficient to warrant the conclusion that *Moitie* does not apply here.

Respondents attempt to derive some support for their construction of the *Moitie* footnote by discussing the three cases cited at the end of the footnote; if anything, however, the Court's citation of these cases supports petitioners' understanding of the footnote. In each of the three cases, claims had been filed in state court involving alleged anti-competitive conduct, one of them in the labor context; the district courts stated that the complaints, although purporting to rely on state law, read like federal antitrust claims (and, in one case, a secondary boycott claim that would be actionable under section 303 of the LMRA). These courts concluded that the plaintiffs there were really invoking these federal rights, and upheld removal solely on this basis. Not a single one of these cases involved removal based on an affirmative defense; none involved removal based on the preclusion of the state law claim by res judicata.

And yet respondents here contend that, in a cryptic footnote that does not address the basis for removal, this Court intended to invent *sub silentio* a novel ground for removal, that not a single reported opinion had ever previously accepted, and that runs directly contrary to a hundred years of precedent barring removal based on the presence of a federal question in a defense. And respondents urge the Court to announce now that this construction was really what was intended, even though, as discussed in our opening brief, at 19-25, the Court has repeatedly disavowed any suggestion that a federal defense may support removal in its post-*Moitie* decisions. Respondents

cite some decisions from the lower federal courts which, struggling with the *Moitie* footnote, have opined that it was based on res judicata effect; but they never come to grips with this Court's post-*Moitie* decisions and they never offer any basis in *Moitie* itself for construing the footnote in this way.

In sum, the most basic of respondents' five key propositions -- that *Moitie* creates a rule allowing removal whenever a state law claim is barred by a federal judgment, so that a federal court may apply the doctrine of res judicata -- is utterly without foundation.

2. The Novel Jurisdictional Doctrine That the Defense of Federal Res Judicata Is Sufficient to Create Removal Jurisdiction Need Not Be Created in Order to Ensure the Uniform Interpretation of Federal Res Judicata Law or the Advancement of the Underlying Federal Interests.

Respondents also argue that their construction of the *Moitie* footnote should be adopted to ensure that the federal law of res judicata will receive uniform interpretation in all lower courts, and that the integrity of federal judgments is fully respected. These are both worthy objectives, but the fact is that the very same objectives could be said to support the extension of federal jurisdiction into other areas where federal defenses are asserted. Thus, if this is a good enough reason to read the *Moitie* footnote to create a rule of federal jurisdiction for this federal defense, it is hard to see why other federal defenses should be deemed less worthy.

In effect, on respondents' theory there would now be **two** "independent corollaries" to the well-pleaded complaint rule -- corollary (a) being complete preemption, and corollary (b) being complete preclusion. They say that the reason for

elevating preclusion to the level of complete preemption is that it is "equally powerful," R. Br. 27, but they never say just why that is so. They never explain why other defenses based on federal law are not just as powerful and important as preclusion. The danger here is that corollary (b) will necessarily expand so that the "preclusion" will not simply be preclusion under theories of res judicata but also preclusion because of other federal bars to pursuit of a state law claim.

For example, the First Amendment surely rivals in importance the doctrine of res judicata, and the interpretation of this Court's decisions about the public figure doctrine, the law of malice, and similar libel issues, would surely gain greater cohesiveness if there were only twelve circuits, instead of twelve circuits plus fifty-one local jurisdictions developing the First Amendment law of libel. On that theory, respondents' argument would justify the removal of all libel cases to the federal courts. And what of pre-emption of state cases in the labor area, under the NLRA, for example, *see Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132 (1976); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); or ERISA as well? Surely the administration of the law in those areas would be smoother if defendants could remove cases in which they raise such preemption defenses and have them litigated in the federal courts, which customarily review NLRB decisions and thus are far more familiar with federal labor law principles than are the state courts. On that theory, both *Franchise Tax Board* and *Caterpillar*, which held that ERISA and NLRA preemption defenses are not grounds for removal, ought to be overruled. And tribal sovereign immunity -- surely that too is an important federal doctrine, and many tribes believe that they cannot get a fair hearing at the hands of state judges who are responsive to local politics. Thus, *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989) should also be overruled so that this defense is also a sufficient basis to enable a defendant to secure the

protection of the federal courts.

The fact is, of course, that as this Court has repeatedly stated, cases are not to be removed from state courts on the ground that state courts cannot be trusted to apply federal law in the proper manner. The ultimate guarantee that federal law will receive a uniform interpretation by all courts empowered to consider federal issues is that cases raising such questions are subject to review by this Court. To be sure, different federal circuits or district courts sometimes arrive at different interpretations of federal law, just as there are differences among the state courts and between state and federal courts. But this Court's jurisdiction extends to both sets of lower federal courts, and the Court is vigilant to ensure proper application of federal law in all lower courts.[2]

3. *Moitie* Is Not the "Precursor" of the Doctrine of Complete Preemption.

In an apparent effort to provide their construction of the

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[2] Respondents suggest that removal is a better way to deal with a state suit that is barred by a federal judgment because it avoids the offense to state sovereignty that is entailed by issuance of an injunction against relitigation, because removal "works automatically." R. Br. 34-35. In fact, part of the removal process is the issuance of a notice to the state court that, in a manner comparable to an injunction, bars further proceedings unless the case is remanded. 28 U.S.C. § 1446(d). But removal is a far more serious invasion of state sovereignty than a mere injunction, because it deprives that state of its sovereign authority to provide a tribunal for the disposition of its citizens' claims. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941).

Moitie footnote with a patina of intellectual respectability, respondents argue that, even though the doctrine of complete preemption and the ensuing "recharacterization" of otherwise state law complaints do not apply here, *Moitie* should be deemed the analytic precursor of the doctrine of complete preemption. After, all, respondents urge, three of the four key cases in this Court on the issue of complete preemption -- *Franchise Tax Board*, *Caterpillar*, and *Metropolitan Life* -- were all decided after and in light of *Moitie*. Not only is this argument historically incorrect, but review of those cases shows that they undercut respondents' argument.

None of these three post-*Moitie* cases established the rule that state law claims could be removed based on their recharacterization under the doctrine of complete preemption. To the contrary, that rule was firmly established in 1968 by *Avco Corp. v. Machinists Lodge 735*, 390 U.S. 557 (1968), and was applied or invoked several times after *Avco* and before *Moitie*. *E.g.*, *Boys Markets v. Retail Clerks Local 770*, 398 U.S. 235, 244 *et seq.* (1970); *see also Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666, 675 (1974). It could hardly be said that, in *Franchise Tax Board* and *Caterpillar*, the Court was developing the doctrine of removal pursuant to complete preemption -- if anything it was imposing firm limits on the reach of that doctrine, holding that it would not apply just because a case might be barred by some other federal preemption doctrine (*Franchise Tax Board*) and that it would not apply even if a federal question under section 301 had to be decided in order to resolve a defense to a state law claim (*Caterpillar*). Nor did any of these three cases even cite, much less acknowledge any debt to, the majority opinion in *Moitie*. The notion that *Moitie* is their analytic precursor, or the precursor of recharacterization through the doctrine of complete

preemption, is imaginative indeed.[3]

Moreover, in *Metropolitan Life* the Court strongly implied that common law adjudication was not an appropriate means for the development of additional exceptions to the rule against removal based on the presence of a federal bar to the prosecution of a state law claim. In *Metropolitan Life*, the question was whether a state law claim that depended on the determination of the meaning of an ERISA plan arose under federal law and hence was removable to federal court. The Court discussed the general rule that preemption of a state law claim, even ERISA preemption of such a claim, does not convert the state claim into one arising under federal law. "In the absence of explicit direction from Congress, this question would be a close one," 481 U.S. at 64, and "we would be reluctant to find that extraordinary pre-emptive power [comparable to LMRA section 301] that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Accord*, *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841-842 (1989) (declining to craft exception to permit removal based on tribal immunity defense, because Congress has provided by statute for removal based on some immunities)

However, ERISA's jurisdictional provision "closely parallels that of § 301," *id.*, and the Conference Report on ERISA explicitly stated that suits to enforce benefit rights or to recover benefits under the plan "are to be regarded as arising

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[3] *Moitie* is not cited at all in *Franchise Tax Board or Metropolitan Life*. Only Justice Brennan's dissenting opinion is cited in *Caterpillar*, and then as indirect support for the proposition that the artful pleading doctrine cannot be invoked to support removal on the basis of facts not alleged in the complaint. 486 U.S. at 397 and n.11.

under the laws of the United States in similar fashion to those brought under section 301 . . .." *Id.* 65-66. The Court concluded that "[n]o more specific reference to the Avco rule can be expected . . .," and "Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court." *Id.* 66. "Accordingly, this suit . . . is necessarily federal in character by virtue of the clearly manifested intent of Congress." *Id.* 67.

Here, by contrast, Congress has not manifested any desire that the federal defense of res judicata support federal jurisdiction or removal to federal court, and the Fifth Circuit's decision allowing such removal should be reversed.

4. Recharacterization Cannot Be Justified on the Mere Nonexistence of State Law Supporting the Complaint.

Respondents contend that, under the doctrine of complete preemption, a federal court may decide that a state law claim should be recharacterized based upon its investigation of the state law on which the complaint purports to rely, if it concludes that state law would not, in fact, provide a basis for relief for the claims in the complaint. Thus, according to respondents' argument, it is but a short step to deciding that, if a state law claim can be found to be barred by an existing state law judgment, that too is a basis for deciding that the state law claim is "nonexistent" and that therefore the complaint must be federal in nature rather than state in nature.

However, complete preemption is not based on the "nonexistence" of relevant state law. Complete preemption removal is proper only if court a concludes that the claims rely on a collective bargaining agreement (or on an ERISA plan, after *Metropolitan Life*). And the case is removable because

federal law has so thoroughly regulated the field that the claim is not "extinguished" -- it is transformed into one that arises under federal law. The mere fact that there is no state law supporting the claim does not support removal.

Thus, complete preemption and complete preclusion are not two different ways of rendering a state law claim nonexistent. Under complete preemption, the federal claim supplants the state claim. Under claim preclusion, by contrast, the state law claim remains a state law claim, it is just subject to a federal affirmative defense. Otherwise, as argued above in point 2, there is no principled way to distinguish between preclusion and any other federal defense in this context, and respondents' theory will entail a vast expansion of federal removal jurisdiction.

5. In No Other Context Does Jurisdiction Depend on a Determination That the Case Is Lacking in Merit.

Finally, respondents try to excuse the district court's having decided the merits before ascertaining whether it had jurisdiction of the case by arguing that this is frequently done in other contexts. R. Br. 36-38. Respondent cites the complete preemption doctrine as its first and best example, stating that "the court must decide a merits issue, federal preemption of plaintiff's state law claims, to determine its jurisdiction." *Id.* 36.

But there is a very important difference between this and every other context. The mere fact that a claim is completely preempted does not mean that it must be dismissed. Once a court decides that a state law claim depends on a collective bargaining agreement and so complete preemption applies, it proceeds to consider the case under the precedents decided under LMRA section 301. Those precedents may well require dismissal of the claim (typically, dismissal without prejudice for failure to exhaust, or dismissal with prejudice on grounds of

timeliness or failure to show a breach of the duty of fair representation), and knowledge of these precedents often provides a powerful incentive for assertion of complete preemption. But the mere adoption of jurisdiction is not legally equivalent to dismissal of the claim.

Respondents' theory is very different. If the court concludes that the case is barred by res judicata, that is simultaneously sufficient to effect removal of the case and dismissal of the claim on the merits. Thus under respondents' rule, a judge faced with a removal petition must apply the following formulation -- if a plaintiff is dead on the merits, then I have jurisdiction; but if the plaintiff is not dead on the merits, then I lack jurisdiction. Try as they may to show that this circular reasoning has been applied in other contexts, there is not a single other example in the law of federal jurisdiction.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded with instructions to remand to state court.

Respectfully submitted,

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